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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. ——

72-1561

PARADISE PALMS COMMUNITY ASSOCIATION,
Petitioner,

—v.—

PARADISE HOMES, IRWIN MOLASKY AND HARRY LAHR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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IN THE
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PARADISE PALMS COMMUNITY ASSOCIATION, *Petitioner*	)
VS.	
PARADISE HOMES, IRWIN MOLASKY AND HARRY LAHR, *Respondents.*	)

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF NEVADA

Petitioner, Paradise Palms Community Association, through its counsel, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Nevada in the case **Paradise Palms Community Association v. Paradise Homes, Irwin Molasky and Harry Lahr,** 89 Nev._____, 505 P.2d 596 (1973).

OPINIONS BELOW

The trial court entered an order granting summary judgment without opinion. The order is attached as Appendix C. The opinion of the Supreme Court of Nevada is reported at 89 Nev._____, 505 P. 2d 596 (1973) and is attached as Appendix B. A motion for rehearing to the Supreme Court of Nevada was denied February 21, 1973, without opinion.

JURISDICTION

The Supreme Court of the State of Nevada affirmed the judgment of the trial court on January 22, 1973, and denied motion for rehearing on February 21, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3), 62 Stat. 929.

QUESTIONS PRESENTED

Petitioner, a non-profit association who has never appeared in the original action, has been barred on collateral estoppel from contesting the personal jurisdiction of a default judgment, because an individual member had unsuccessfully moved in the original action to vacate the judgment, even though the member was at the same time held to lack standing for the motion. In addition, the member failed to file a timely appeal resulting in the loss of the opportunity for appellate review on the merits of jurisdiction.

Under these circumstances was the application of collateral estoppel to bar the petitioner association a denial of due process?

Subsidiary Questions:

1. Was considering an appearance by the single member in the first action, without a further showing of authority than mere membership, as an appearance by the petitioner a denial of due process?

2. Was the issue here precluded, adequate service of process, necessary to the entry of the order in action one and if not was the application of collateral estoppel to it in this action a denial of due process?

3. Did the member fully and fairly litigate the issue involving jurisdiction?

4. Was the resultant loss of petitioner's opportunity for appellate review through the member's procedural mistake a denial of due process?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The following Nevada procedural rules are set forth in Appendix A: NRCP 59(e); 60(b).

The following constitutional provisions are set forth in Appendix A: United States Constitution, Amendments XIV.

STATEMENT OF THE CASE

A default judgment in a prior action had been granted against the petitioner in favor of the respondent corporation, Paradise Homes, with process being served on a person, Irwin Molasky, who admittedly was the president of the plaintiff corporation (respondent here) and had instigated the action. (Molasky Depo. 72-79). Service was made apparently on the assumption that Molasky was an officer of both organizations, although the certificate of service does not indicate his capacity. Mr. Molasky did nothing to notify any officers or members of the association. (Molasky Depo 85-104). Now the petitioner has been barred by collateral estoppel from contesting this service because a member of petitioner had unsuccessfully moved to set aside the default judgment.

Petitioner, Paradise Palms Community Association, is a Nevada non-profit, non-stock incorporated association which had been formed by the respondent stock corporation, Paradise Homes and other joint developers to hold certain park land, in a subdivision they had developed, for the benefit of its members who are the residents of that subdivision. (Molasky Depo 35-36.) At the time of petitioner's organization it had joint officers with Paradise Homes including Mr. Molasky. Petitioner claims they had since been replaced prior to the first action. (Lahr Depo, Exhibit A-T).

Mr. R. Paul Sorenson, a member of the petitioner association upon becoming apprised of the sale of the association's only asset, the park, to the respondent corporation and judgment holder, Paradise Homes, (R 104) moved in the default action pursuant to Rule 60(b) of the Nevada Rules of Civil Procedure[1] to set aside and vacate the judgment on the ground, among other things, that the person who had been served was not an officer of the association at that time. (R 107). The motion stated as follows: "Comes now, Defendant, Paradise Palms Community Association by and through one of its members or one of the persons entitled to membership in said association, for the reason that there is no qualified officer willing to act on behalf of said association and moves to set aside the judgment. ..." (R 107). In his affidavit to support the motion, Mr. Sorenson, deposed that he had no authority aside from his being a member or one entitled to membership. (R 125). This was the tenor of his testimony. (Supp R 19-30). Counsel for Paradise Homes not only contested his membership (Supp R 31) but his standing as a member to bring the motion under Rule 60 (equivalent to FRCP 60). (Supp R 33-35). Mr. Sorenson at this hearing did not have the benefit of the testimony of Mr. Molasky, the person originally served or the records of the association.

In ruling on defendant's motion the court stated: "It appearing that valid service was effected upon Irwin Molasky, Secretary of Paradise Palms Community Association, and that application has been made after unreasonable delay, and it does not appear that the applicant has any standing to make such motion, IT IS ORDERED That the Motion be, and is hereby denied." (Appendix E, R 110).

Mr. Sorenson then moved to amend or alter the judg-

[1] Nevada has adopted the Federal Rules of Civil Procedure for its own courts.

ment in the same capacity based on the record already made. (R 113). In its order denying this motion the court made a finding that Molasky was secretary of the association at time of service and a conclusion that service was as provided by law. (R 115). Mr. Sorenson appealed both orders and the Nevada Supreme Court held that the second motion, to alter and amend under Rule 59(e) NRCP, was not suitable for a default judgment so being a nullity it therefore did not toll the thirty days for filing an appeal from the first order. It affirmed the denial of the motion to vacate on the ground that the appeal was not timely, (R 117-119) reported at 86 Nev. 859, 477 P. 2d 859 (1970).

In the present lawsuit petitioner has commenced an action against Paradise Homes, Irwin Molasky and Harry Lahr on a pleading verified by the Vice President of the petitioner/association. (R 1-7). It alleges three claims for relief. The first, being the subject of this petition, seeks to have the prior default judgment declared void alleging that Irwin Molasky was not an officer upon whom service of process could properly be made. (R 1-3).

Records of petitioner now available (Lahr Depo, Exhibit A-T) show that Mr. Molasky was no longer an officer of the petitioner/association at the time of service which is more or less admitted by Mr. Molasky in his deposition. (Molasky Depo 1-130). He also admits that he took the papers to the attorney for respondent Paradise Homes (Molasky Depo 81) who did nothing to notify officers or members of the association and who also signed and filed the Praecipe for Default. (Supp R 3).

The respondents moved for summary judgment claiming that service of process had been litigated in the prior action on Mr. Sorenson's motion such that petitioner was barred from litigating the issue here by the doctrine of col-

lateral estoppel. The trial court granted summary judgment for respondents, (Appendix C, R 170-171) which was affirmed by the Supreme Court of Nevada, Appendix B.

How Federal Question was Presented

Petitioner raised the federal question in the court of first instance, the District Court for Clark County, Nevada, by opposing respondent's motion for summary judgment on September 24, 1971. R 141-147). Summary judgment was granted in favor of respondent by order on November 9, 1971, Appendix C. Petitioner appealed the order to the Supreme Court of the State of Nevada which affirmed the District Court with an opinion filed January 29, 1973, Appendix B, reported at 89 Nev._____, 505 P. 2d 596. Motion for rehearing was denied February 23, 1973, without opinion. The petition for rehearing is attached to Appendix D. The petitioner is requesting review of the decision of the Nevada Supreme Court.

REASONS FOR GRANTING THE WRIT

I. IT IS A VIOLATION OF DUE PROCESS TO EMPLOY COLLATERAL ESTOPPEL AGAINST PETITIONER TO FORECLOSE LITIGATION ON PERSONAL JURISDICTION WHEN IT HAD NOT BEEN A PARTY TO THE PRIOR LITIGATION.

It is axiomatic to due process that a state cannot foreclose a party without affording a **meaningful** opportunity to be heard on the issue. **Boddie v. Connecticut,** 401 U.S. 371 (1971). It is equally axiomatic that no one can be bound by a judgment without being a party to it with jurisdiction over the person. **Zenith Radio Corp. v. Hazeltine Research, Inc.,** 395 U.S. 100 (1969); **Hanson v. Denckla,** 357 U.S. 235 (1958); **Vanderbilt v. Vanderbilt,** 354 U.S. 416 (1957); **Riley v. New York Trust Co.,** 315 U.S. 343 (1942);

Hansberry v. Lee, 311 U.S. 32 (1940); **Pennoyer v. Neff,** 95 U.S. 714 (1878). Petitioner, which is in reality its beneficiaries, who are homeowners and the public, has lost its only asset, a public park, through execution sale without ever having an opportunity to litigate the issue of personal jurisdiction because a single member without authority had appeared and unsuccessfully moved to vacate the judgement.

This case is an egregious example of what has come of the confusion born out of the demise of mutuality of estoppel. The Nevada Court in its zeal to consider whether collateral estoppel can be applied in favor of new parties refused to recognize that it was being applied against a party who had not previously been before the court. This is certainly a denial of due process. **Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,** 402 U.S. 313 (1971); **Zenith Radio Corporation v. Hazeltine Research, Inc.,** 395 U.S. 100 (1969); **Hansberry v. Lee,** 311 U.S. 32 (1940).

II. THE SUPREME COURT HAS NOT DEFINED THE TOLERABLE LIMITS FOR STATE APPLICATION OF COLLATERAL ESTOPPEL, PARTICULARLY WITH RESPECT TO WHAT MAY BE CONSIDERED AN APPEARANCE TO BIND A PARTY TO A JUDGMENT.

Every denial of due process is important but the issue here has additional national importance. The employment of collateral estoppel is expanding and there has been a general shift of the states away from the requirement of mutuality with much confusion and misguided thinking, yet the Supreme Court has not defined the tolerable limits for states regarding who may be bound by prior litigation of an issue within the due process clause of the 14th Amendment. Most cases on the subject do not distinguish between the requirements of due process and the judicial

policy of collateral estoppel which would be a state matter. The Court must define those limits and reverse the decisions which exceed them. This is such a case. Of particular importance here, the Court has not considered what may be regarded to constitute an appearance in order to bind a party. This case presents the question of whether or not an appearance by a single member can bind an association.

III. THE RECORD SHOWS CONCLUSIVELY THAT THE PETITIONER WAS NOT ITSELF A PARTY TO THE PRIOR LITIGATION.

The Nevada Supreme Court merely assumed without analysis that petitioner had litigated the issue in the prior action, Appendix B, pp. 1-2, 89 Nev._____, 505 P. 2d 596, although petitioner pointed out both in its brief and motion for rehearing that it had not been before the court. The Nevada Court's opinion was particularly disappointing because it made no analysis of the facts. Here we had the spectacle in the prior action of the president of the plaintiff corporation causing himself to be served supposedly as an officer of the defendant then advising no one except the lawyer for the plaintiff corporation who took a default judgment resulting in a sale to the plaintiff corporation of the defendant's only asset. (Molasky Depo 1-130). This alone should cause the Court to make a careful inquiry to see that the defendant had a proper opportunity to litigate the case. Unconstitutionality can easily be concealed and glossed over by procedure if the facts are assumed and not inquired into. **Boykin v. Alabama,** 395 U.S. 238 (1969).

As no one could sensibly argue that naming petitioner in the pleadings without service of process or an appearance to support jurisdiction would have made it a party to the prior action, we do not question that if petitioner had

been properly served in the prior action, due process would have been satisfied. But that is the question sought to be litigated. Unless petitioner made an appearance in the prior action, it has a right to litigate the issue of personal jurisdiction in this action.[2]

The record leaves no question but that the petitioner itself was not before the Court in the prior action. As stated above, the Nevada Supreme Court assumed appearance in the prior action without inquiry. The trial court granted a summary judgment on collateral estoppel without findings of fact, conclusions of law or an opinion, just an order. (Appendix C, R 170). There was no affidavit presented to support the motion, just the pleadings and documents attached to the answer including the proceedings from the prior action. (R 98-131).

These documents furnished by the respondents to support the motion for summary judgment conclusively show

[2] Nevada law clearly holds that a judgment taken without proper service of process is void ab initio unless it is waived by appearance. **State of Nevada ex rel. Nevada Douglass Gold Mines, Incorporated v. The District Court of the Seventh Judicial District, In and For Mineral County,** 51 Nev. 206, 273 Pac. 659 (1929); **Doyle v. Jorgensen,** 82 Nev. 196, 414 P. 2d 707 (1966). The judgment is subject to direct and collateral attack. **In the Matter of the Estate of Singleton,** 26 Nev. 106, 64 Pac. 513 (1901); **State ex rel. Martin v. Justice Court,** 44 Nev. 140, 190 Pac 977 (1920); **State of Nevada ex rel. Nevada Douglass Gold Mines, Incorporated v. The District Court of the Seventh Judicial District, In and For Mineral County,** supra. Further Nevada allows extrinsic evidence to be presented on jurisdiction in a collateral attack. **Nevada Credit Rating Bureau, Inc. v. Zarker,** 82 Nev. 89, 411 P. 2d 478 (1966). This is only background material. The issue here does not concern the adequacy of the procedure Nevada provides to attack default judgments but rather whether or not the petitioner can be foreclosed in such proceedings by collateral estoppel from a prior proceeding it had no part in. Therefore, it is unnecessary to decide if the second action is a direct or collateral attack.

that the petitioner association did not itself appear in the first action. The only appearance was by an unauthorized member who felt it was necessary for him to attempt to save the petitioner's only asset. This is clearly stated in his motion to vacate (R 107-108), affidavit to support the motion (R 125-126) and in his testimony. (R 19-30). In his brief he argued his standing as a member only. (R 130). Respondent, Paradise Homes contested his membership (Supp. R 19-30) and his standing to bring the motion (Supp. R 33-35). Of even greater significance was that the trial court in the first action ruled that the member, Mr. Sorenson did not have standing to bring the motion to vacate, (Appendix E, R 110). The Court will notice that this ruling was made in the same language as the statement that service was proper. Whether this is considered a finding, a decision, a ruling or whatever, it is clear that the trial court in the first action did not consder that it had anyone with standing before the court. This would equally support denial of the motion. This ruling was affirmed by the Nevada Supreme Court. **Paradise Palms v. Paradise Homes,** 86 Nev. 859, 477 P. 2d 859 (1970). The second motion in this first action, to alter and amend, under Rule 59(e) NRCP, Appendix A, was brought in the same manner by the member. Any findings as to it were a nullity as the Nevada Supreme Court held that this motion could not be brought to vacate a default judgment and so refused to review it on the merits. **Paradise Palms v. Paradise Homes,** supra. It is clear that although nominally a party, Paradise Palms Community Association was not before the Court in the first action.

IV. A MOTION TO VACATE THE DEFAULT JUDGMENT PURSUANT TO RULE 60(b) NRCP BY A SINGLE MEMBER WITHOUT STANDING OR AUTHORITY TO ACT FOR PETITIONER IS NOT SUF-

FICIENT TO BIND PETITIONER WITHOUT VIOLATING DUE PROCESS.

This leaves the question of whether the motion to vacate presented and argued by a single member can bind petitioner to its result. We think not. There is a threshold difficulty here in that the trial court in action one held along with the ruling on jurisdiction that the member did not have standing to bring the motion. (Appendix E, R 110). Lack of standing could only mean there that no one was properly before the court. Holding now that that was an appearance to bind petitioner to the result is contradictory. The court in action two cannot accept part of the ruling as res judicata and reject the other part. The matter of standing was just as fully litigated as the issue sought to be foreclosed. Resolution of the issue of service of process was not necessary to denial of the member's motion. The court also found that it was untimely and that the member lacked standing. (Appendix E, R 110). Both grounds would equally support denial of the motion.

Even aside from this consideration a holding that the action of a member in this fashion would bind the association violates due process. The Nevada Court did not address itself to the question but merely passed over it by assuming without basis that petitioner was a party to action one.

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 329 (1971) flatly states that collateral estoppel cannot be applied against someone who was not a party to the first action. This is the last word on the subject. We need not get into the matter of privity in this case, because the member, Mr. Sorenson, was himself never a party to the prior action nor did he litigate his interests whatever they may have been. His interests may have been derivative of the association's but certainly no

interest of the association is derivative of his. A mere similarity of interests does not create privity. In any case, since the member, Mr. Sorenson, never became a party to action one there was no determination as to him except that he lacked standing for his motion. So considerations of privity between a party to action one and a party to action two are inapposite.

Mr. Sorenson only made a motion in behalf of the association and was found to lack standing to do so which is supported by authority. **State ex. rel. Garaventa Land and Livestock Co. v. Second Judicial District Court, In and For Washoe County, et al.,** 61 Nev. 350, 128 P. 2d 266, (1942). Thus looms the importance of the determination on standing. Even the exception to strict identity of parties concerning a judgment rendered in an action in which a party thereto properly acts on behalf of another is inapplicable because it requires the person litigating to be a party. Restatement, Judgments, S.85, (1942). Even aside from that, this exception requires the authority or power to act. Restatement, Judgments, S.85, comment g, (1942). Thus there is privity between officers of the government, if the agent in the action has authority. **Sunshine Anthracite Coal Co. v. Adkins,** 310 U.S. 381 (1940). This exception was created for those with legal authority to act for another: agents ,administrators, trustees, etc. Mr. Sorenson never had nor purported to have authority to act for the association.

In addition to lack of standing or authority and the fact that Mr. Sorenson was never a party, it is obvious that the matter was not completely litigated. While there was no apparent lack of good faith, Mr. Sorenson was severely handicapped. He was without the benefit of the testimony of the person served and the association's rcords, both now available and in the record of this action in deposition

form. Further, through a procedural mistake, he lost the opportunity for appellate review on the merits. While appeal is not required as a matter of constitutional right, it is important and cannot be withheld arbitrarily. **National Union of Marine Cooks and Stewards v. Arnold,** 348 U.S. 37, (1954). Can a matter be said to be completely litigated if petitioner was deprived the benefit of an appellate review on the merits? As a matter of simple justice, petitioner should not be foreclosed by the precipitous action of one unauthorized member.

In any case, the proposition that a member in attempting to make a motion, can bind the association to a judgment is in clear conflict with the holding in **Zenith Radio Corp v. Hazeltine Research, Inc.,** 395 U.S. 100 (1969) which held that a parent corporation, not a party, cannot be bound to a judgment against a wholly owned subsidiary which is obviously under the control of the parent and where it was stipulated in the action that for the purposes of the action they would be considered one and the same company. This Court stated that holding the judgment as res judicata against the parent in a later action would require a determination that the parent controlled the litigation in the first action and that that issue would have to be adjudicated against the parent only in a court with jurisdiction over the parent. 395 U.S. at 111. That involved a wholly owned subsidiary. In this case there have been no findings concerning the member's relationship to the association. Clearly the petitioner cannot be foreclosed the right to litigate the issue of jurisdiction without the violation of due process.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Nevada.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

RULES OF CIVIL PROCEDURE

RULE 59. NEW TRIALS; AMENDMENT OF JUDGMENTS

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after service of written notice of entry of the judgment.

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(b) Mistakes; Inadvertence; Excusable Neglect; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) fraud, misrepresentation or other misconduct of an adverse party which would have theretofore justified a court in sustaining a collateral attack upon the judgment; (3) the judgment is void; or, (4) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that an injunction should have prospective application. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than six months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

U.S. CONSTITUTION
AMENDMENT XIV

Section 1. **Citizenship; privileges and immunities; due process; equal protection.** All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED JANUARY 29, 1973

No. 6878

PARADISE PALMS COMMUNITY ASSOCIATION, A NEVADA NON-STOCK COOPERATIVE ASSOCIATION,
Appellant,
vs.
PARADISE HOMES, A NEVADA CORPORATION, IRWIN MOLASKY, AND HARRY LAHR,
Respondents.

Appeal from summary judgment; Eighth Judicial District Court, Clark County; John F. Mendoza, Judge.

Affirmed.

HARRY J. MANGRUM, JR., OF LAS VEGAS,
FOR APPELLANT.

LIONEL SAWYER COLLINS & WARTMAN, OF LAS VEGAS,
FOR RESPONDENTS.

OPINION

By the Court, THOMPSON, C. J.:

This appeal is from an order of the district court granting summary judgment to the defendants, Paradise Homes, Molasky and Lahr, on the first of three claims for relief asserted against them by Paradise Palms Community Association. The district court determined that there was no just reason to delay the entry of judgment. NRCP 54(b). The action remains pending against the defendants on the second and third claims for relief alleged.

The propriety of the summary judgment on the first claim for relief turns upon the legal effect of prior litiga-

tion between Paradise Homes as plaintiff and Paradise Palms Association as defendant. In that case Homes secured a default judgment against the Association in a suit upon a promissory note. The Association moved to set aside the judgment thus entered on the ground that it was void, since Irwin Molasky who was served with process in an effort to acquire jurisdiction over the Association, was not a person upon whom service was authorized. After an evidentiary hearing, the district court found that the service of process upon Molasky was valid, and denied the Association's motion. The Association appealed. We affirmed, since the appeal was not timely filed. Paradise Palms v. Paradise Homes, 86 Nev. 859, 477 P. 2d 859 (1970).

In the present case, the Association's first claim for relief seeks to have the prior default judgment against it declared void, again alleging that Irwin Molasky was not a person upon whom service of process properly could be made and that the default judgment was and is void. Since that issue of fact was adjudicated in the first case, each of the defendants content that the doctrine of collateral estoppel precludes the rlitigation thereof. Cf. Clark v. Clark, 80 Nev. 52, 389 P. 2d 69 (1964).[1] That doctrine obviously is available to the Defendant Paradise Homes and affords immunity to the first claim for relief asserted against that defendant. However, the other defendants, Molasky and Lahr, were not parties to the first case. Whether they also may claim the benefit of collateral estoppel is the question to which we now turn.

In the landmark case of Bernhard v. Bank of America

[1] The alternative Second and Third Claims for relief allege that the service of process upon Molasky in the prior action was valid, and seek relief upon the ground of extrinsic fraud. As noted, these claims remain pending.

Trust & Sav. Ass'n, 122 P. 2d 892 (Cal. 1942), Justice Traynor considered this question with regard to the doctrine of res judicata. He wrote: "The doctrine of res judicata precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction. Any issue necessarily decided in such litigation is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action. (Citations) The rule is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drwing it into controversy. (Citations) The doctrine also serves to protect persons from being twice vexed for the same cause. Ibid. It must, however, conform to the mandate of due process of law that no person be deprived of personal or property rights by a judgment without notice and an opportunity to be heard. (Citations)

"Many courts have stated the facile formula that the plea of res judicata is available only when there is privity and mutuality of estoppel. (Citations) Under the requirement of privity, only parties to the former judgment or their privies may take advantage of or be bound by it. Ibid. A party in this connection is one who is 'directly interested in the subject matter, and had a right to make defense, or to control the proceeding, and to appeal from that judgment.' 1 Greenleaf, Evidence, 15th Ed., sec. 523. (Citations) A privy is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase. (Citations) The estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him. (Citations)

"The criteri for determining who may assert a plea of

res judicata differ fundamentally from the criteria for determining against whom a plea of res judicata may be asserted. The requirements of due process of law forbid the assertion of a plea of res judicata against a party unless he was bound by the earlier litigation in which the matter was decided. (Citations) He is bound by that litigation only if he has been a party thereto or in privity with a party thereto. Ibid. There is no compelling reason, however, for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation.

"No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as res judicata against a party who was bound by it is difficult to comprehend. (Citation) Many courts have abandoned the requirement of mutuality and confined the requirement of privity to the party against whom the plea of res judicata is asserted. (Citations) . . .

"In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?"

That decision is equally applicable to the doctrine of collateral estoppel. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971); Sample v. Chapman, 497 P. 2d 1334 (Wash. App. 1972); Murphy v. Northern Colorado Grain Co., 488 P. 2d 103 (Colo. App. 1971); Bahler v. Fletcher, 474 P. 2d 329 (Ore. 1970); Halvorsen v. Grain Dealers Mut. Ins. Co., 210 F. Supp. 73 (W. D. Mich. 1962). We approve the Bernhard decision for Nevada.

The instant matter satisfies the test announced in Bernhard. The issue decided in the first case between Paradise Homes and Paradise Association is idntical to the controlling issue of the first cause of action here. There was a final judgment, the validity of which was fully explored in an adversary manner on the motion to set aside the default judgment, and a timely appeal was not taken from the ruling thereon. The party aginst whom the affirmative defense of collateral estoppel is asserted, Paradise Association, was a party to the prior litigation. Accordingly, the summary judgment for the defendants on the first claim for relief is affirmed.

THOMPSON, G. J.

We concur:
ZENOFF, J.
BATJER, J.
MOWBRAY, J.
MCDANIEL, D. J.

APPENDIX C

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK
FILED NOVEMBER 9, 1971
CASE NO. A 87019

PARADISE PALMS COMMUNITY ASSOCIATION, A NEVADA NON STOCK COOPERATIVE ASSOCIATION,
Plaintiff,

vs.

PARADISE HOMES, A NEVADA CORPORATION; IRWIN MOLASKY; HARRY LAHR; MERV ADELSON AND JOHN DOES I THROUGH 30,
Defendants.

JUDGMENT

For good cause shown,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants, PARADISE HOMES, a Nevada corporation; IRWIN MOLASKY and HARRY LAHR shall have judgment in their favor and against plaintiff, PARADISE PALMS COMMUNITY ASSOCIATION, on the first cause of action.

DATED this 9 day of November, 1971 nunc pro tunc the 27th day of October, 1971.

J. F. MENDOZA
DISTRICT JUDGE

Submitted by:
LIONEL, SAWYER, COLLINS & WARTMAN

APPENDIX D
CASE NO. 6878
IN THE SUPREME COURT
OF THE STATE OF NEVADA
PETITION FOR REHEARING

PARADISE PALMS COMMUNITY ASSOCIATION, A NEVADA NON-STOCK COOPERATIVE ASSOCIATION,
Appellant,

vs.

PARADISE HOMES, A NEVADA CORPORATION, IRWIN MOLASKY AND HARRY LAHR, MERV ADELSON, AND JOHN DOES I THROUGH XXX,
Respondents.

TO: THE HONORABLE CHIEF JUSTICE and to the ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF NEVADA

The Petitioner requests rehearing in the above entitled matter and further petitions that the decision heretofore entered by this court on the 29th day of January, 1973, be reversed, and that the Order entered by the Eighth Judicial District Court granting the respondents' Motion for Summary Judgment, be overruled for the reasons and upon the grounds hereinafter stated, to-wit:

1. The Supreme Court overlooked and misconstrued certain facts in the case when it stated that "The Association moves to set aside the judgment thus entered . . .", page 2, line 2 of the Opinion; ". . . and denied the Associations' Motion." Page 2, line 7.

2. The court apparently failed to consider the fraudulent methods employed by the respondents and their counsel in obtaining the jurisdiction of the court in the original proceeding No. A51193.

3. The court misapplied the law as set down in the case of **Bernhard vs. Bank of America Nat. Trust and Sav. Ass'n,** 122 P2d 892 (Cal. 1942) as it applies to the case at bar.

POINTS AND AUTHORITIES

The court, in discussing the doctrine of res judicata and collateral estoppel, which applies to the case at bar, quoted at great length from the Bernhard Case. The court stated in page 2, line 29 of its Opinion that "the rule is based upon the sound and public policy of eliminating litigation by preventing a party who has had one **fair trial** on an issue from again drawing it into controversy. (Emphasis Added.) The doctrine also serves to protect persons from being twice vexed for the same cause. It must, however, conform to the mandate of **due process of law** that no person be deprived of personal or property rights by a judgment without notice and an **opportunity to be heard."** (Emphasis Added.) The facts, in the case at bar, as evidenced by the voluminous records before this court, show beyond any doubt, that the appellant in Case No. A51193 did not have a fair trial on any of the issues and was in fact deprived of property rights by judgment without ever having been notified of the pendency of said action in which a said judgment was rendered and without having had the opportunity to be heard on the same. Page 9, line 29, through page 10, line 30, Appellant's Opening Brief.

The Bernhard Case stands for the proposition that the doctrine of res judicata and collateral estoppel operates as a bar to subsequent litigations on the same issues only where the party against whom said offenses are raised has in the prior proceedings been afforded the rights and privileges guaranteed by the Fourth, Sixth and Fourteenth Amendments to the United States Constitution. The requirements of due process must be met and the party

must be afforded a fair trial on the issues before the adverse party in the subsequent proceeding can raise the defense for res judicata and collateral estoppel as to issues raised in the prior proceedings. The appellant was certainly not afforded these rights in the original cause.

The court indicates at line 2, page 2 of its Opinion that "the association moved to set aside the judgment. . ." this is not the case. In the initial proceeding, a member of appellant association, upon becoming aware that a default judgment had been entered against the association, and upon becoming apprised of the fact that the park belonging to said association had been levied upon and sold at the Sheriff's Sale, filed a Motion to set aside the judgment. After a short, limited evidentiary hearing, the Honorable Taylor H. Wines, in denying applicant's Motion to Set Aside Judgment stated for his reasons therein that a valid service was affected upon Irwin Molasky and that the Motion had been made after an unreasonable delay, and more importantly, expressly found and ruled that the applicant, had no standing to make the motion on behalf of the appellant association. By its very ruling, the court held that neither the association nor any other proper party had in fact made an appearance.

These rulings were appealed in the original Case No. A51113, which appeal this Honorable Court refused, confirming the original decision on the grounds that the appeal had not been timely filed since a motion to alter amended judgment does not state the time for an appeal to be noticed. However one views it, it is patently clear that the original ruling that there was no proper party before the court is now absolutely, unequivocally final for the purposes of Nevada Justice. The Court has entirely overlooked this vital point in its Opinion, and this oversite has resulted in a decison that one who was admittedly never

even served with process, and never appeared, is now collaterally estoppel to complain of extrinsic fraud perpetrated against it and the court.

The court has also completely overlooked the facts which form the basis of the present cause of action which has been summarily dismissed, mainly the fraud perpetrated by the respondents and their counsel to obtain the jurisdiction of the court in the original proceeding. Testimony obtained from Irwin Molasky at his deposition taken subsequent to the order granting summary judgment clearly indicates that he, Irwin Molasky, was not in fact an officer or director of said appellant association at the time service of process was made. The method used by the respondents to obtain the jurisdiction of the court in the original proceeding, was to deprive the appellant association of a right to a fair trial of the issues in the case. This court's affirmance of the judgment rendered by the Eighth Judicial District Court granting a summary judgment to the respondents, violates the appellants' rights under the Fourth, Sixth and Fourteenth Amendments of the United States Constitution and such a ruling would in fact permit the respondents to deprive the appellant of its property without due process of law.

Unquestionably, when the jurisdiction of the court is obtained by extrinsic fraud, that is, fraud which deprives the unsuccessful party from an opportunity to be heard and to present his case to the court, there is no adversary proceeding and judgment is open to attack at any time. **Harkins v. Fielder,** 150 CA2d 528, 310 P2d 423, (1957). If there is no adversary proceeding then the defense of res judicata and collateral estoppel is unavailable to the successful parties in a subsequent proceeding on the same issues. **Bernhard vs. Bank of America Nat. Trust and Sav. Ass'n,** supra.

In view of the above, the appellant respectfully requests the court to reconsider its previous opinion and to reverse the Order of the Eighth Judicial District Court.

Respectfully submitted

By _____

THOMAS F. KUMMER for
HARRY J. MANGRUM, JR.
Attorney for Appellant
323 Las Vegas Blvd. South
Las Vegas, Nevada 89101

APPENDIX E

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

FILED NOVEMBER 7, 1969

CASE NO. A51193 — DEPARTMENT NO. 3

PARADISE HOMES,
A NEVADA CORPORATION,
Plaintiff,

VS.

PARADISE PALMS COMMUNITY
ASSOCIATION,
Defendant.

RULING ON DEFENDANT'S MOTION TO SET ASIDE JUDGMENT

This Motion having come on regularly to be heard upon notice and the Court having taken testimony and having heard the arguments of the parties, and

It appearing that valid service was affected upon Irwin Molasky, Secretary of Paradise Palms Community Association, and that application has been made after unreasonable delay, and it does not appear that the applicant has any standing to make such motion,

IT IS ORDERED that the Motion be, and is hereby denied.

DATED as Las Vegas, Nevada, this 7th day of November, 1969.

TAYLOR H. WINES
DISTRICT JUDGE

The parties are referred to the following authorities: N.R.C.P. 60 (b) (3); 4 (d) (1);

HOTEL LAST FRONTIER CORP. v. FRONTIER PROPERTIES, INC., 79 NEV. 150, 380 P2d, 293, (1963); LUKEY v. THOMAS, 75 NEV. 20; 333 P2d, 979, (1959); C.J.S. Sec. 734 ;

STATE, EX REL. GARAVENTA v. GARAVENTA LAND & LIVESTOCK CO., 61 NEV. 110, 118 P2d, 703, (1941); AND

PORTERFIELD v. BLACK BILL & DONEY PARK WATER USERS' ASS'N., 210 P2d, 335, 69 ARIZ. 110 (1949).

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK
FILED DECEMBER 11, 1969
CASE NO. A-51193

PARADISE HOMES, A)
Plaintiff,)
VS.)
PARADISE PALMS COMMUNITY)
ASSOCIATION,)
Defendant.)

ORDER DENYING MOTION TO AMEND OR ALTER JUDGMENT JUDGMENT

The Motion to Amend or Alter Judgment having come on regularly to be heard on December 11, 1969, the Court having heard argument of counsel, and good cause appearing therefor, the Court does hereby make and adopt as its Finding of Fact and Conclusion of Law, with respect to the motion of defendant to set aside judgment, the following:

Finding of Fact

That at the time of service of process upon the defendant, IRWIN MOLASKY was the Secretary of the defendant.

Conclusion of Law

Service of process upon the defendant was made as provided by law.

IT IS FURTHER ORDERED that the motion of the defendant to amend or alter judgment be, and the same hereby is, denied.

Dated this 11th day of December, 1969.

TAYLOR H. WINES
DISTRICT JUDGE

LIONEL & SAWYER

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

FILED FEBRUARY 23, 1968
CASE NO. A 51193

PARADISE HOMES, A NEVADA CORPORATION, *Plaintiff*, vs. PARADISE PALMS COMMUNITY ASSOCIATION, *Defendant.*

JUDGMENT

In this action, the defendant PARADISE PALMS COMMUNITY ASSOCIATION, having been regularly served with Summons and having failed to appear and answer the plaintiff's Complaint filed herein, the legal time for answering having expired, and no answer having been filed, the default of said defendant having been duly entered according to law,

NOW, THEREFORE, on application of the plaintiff,

IT IS ADJUDGED that the plaintiff PARADISE HOMES, a Nevada corporation, recover of and from the defendant PARADISE PALMS COMMUNITY ASSOCIATION the sum of Twenty-three Thousand and no/100 ($23,000.00) Dollars, with interest at the rate of 7% from date hereof, together with costs and disbursements in the sum of $52.40, in all amounting to $23,052.40.

JUDGMENT RENDERED this 23rd day of February, 1968.

ALVIN N. WARTMAN
DISTRICT JUDGE

LIONEL & SAWYER

APPENDIX F

IN THE SUPREME COURT
OF THE STATE OF NEVADA
No. 6878
FILED FEBRUARY 21, 1973

PARADISE PALMS COMMUNITY ASSOCIATION, A NEVADA NON-STOCK COOPERATIVE ASSOCIATION,
Appellant,
vs.
PARADISE HOMES, A NEVADA CORPORATION, IRWIN MOLASKY, AND HARRY LAHR,
Respondents.

ORDER DENYING PETITION FOR REHEARING

Rehearing denied.

THOMPSON, C. J.
MOWBRAY, J.
BATJER, J.
ZENOFF, J.

cc: Counsel of Record

IN THE SUPREME COURT
OF THE STATE OF NEVADA

FILED DECEMBER 15, 1970
No. 6209

PARADISE PALMS COMMUNITY ASSOCIATION,
Appellant,
PARADISE HOMES, A NEVADA CORPORATION,
Respondent.

Appeal from two orders denying motions to set aside a default judgment and to alter or amend the order denying motion to set aside the default. Eighth Judicial District Court, Clark County; Taylor H. Wines, Judge.

Affirmed.

R. PAUL SORENSON, OF LAS VEGAS,
FOR APPELLANT.

LIONEL, SAWYER & WARTMAN AND STEVE MORRIS, OF LAS VEGAS,
FOR RESPONDENT.

OPINION

Per Curiam:

Paradise Palms Community Association has appealed from two orders of the district court denying the Association's motions to (1) set aside a default judgment and (2) alter or amend the order that denied the motion to set aside the default. We affirm the orders of the district court denying both motions.

The motion to set aside the default was filed approximately 19 months after the default had been entered. It was predicated on Rule 60(b) of the Nevada Rules of Civil Procedure,[1] **and particularly reason (3) cited therein, that**

[1] NRCP 60(b):

"(b) **Mistakes; Inadvertence; Excusable Neglect; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) fraud, misrepresentation or other misconduct of an adverse party which would have theretofore justified a court in sustaining a collateral attack upon the judgment; **(3) the judgment is void;** or, (4) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that an injunction should have prospective application. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than six months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or

(Continued on next page)

the judgment was void because the person who had accepted service for the Association was not in fact at that time an officer of the Association. After a hearing before the court, the judge found otherwise, and he denied the motion on November 7, 1969. Notice of entry was served on November 10, 1969.

Rather than appeal at that time from the order of denial, the Association sought to amend or alter the judgment of denial by filing on November 21, 1969, a 59(e) motion,[2] which the judge denied on December 11, 1969. The Association filed a notice of appeal from both orders of denial on January 5, 1970. The 30-day period from notice of entry of judgment denying the 60(b) motion had expired. NRCP 73(a).[3] The 30-day period is jurisdictional. See Culinary Workers v. Haugen, 76 Nev. 424, 357 P. 2d 113 (1960); Smilanich v. Bonanza Air Lines, 72 Nev. 10, 291 P. 2d 1053 (1956); Rogers v. Thatcher, 70 Nev. 98, 255 P. 2d 731 (1953).

Since we have ruled that a 59(e) motion may not be utilized to vacate a default judgment, it is not available to toll the 30-day appeal period from an order denying a 60(b) motion. See Chiara v. Belaustegui, 86 Nev.____, ____ P. 2d____ (Case No. 6202 filed December 14, 1970).

proceeding, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

[2] NRCP 59(e):

"(e) **Motion to Alter or Amend a Judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after service of written notice of entry of the judgment."

[3] NRCP 73(a):

"(a) **When and How (Appeal) Taken.** When an appeal is permitted the time within which an appeal may be taken shall be 30 days from service of written notice of the entry of the judgment appealed from. . . ."

The orders of the district court denying both motions are affirmed.

ZENOFF, Acting C. J.
BATJER, J.
MOWBRAY, J.
THOMPSON, J.
YOUNG, D. J.

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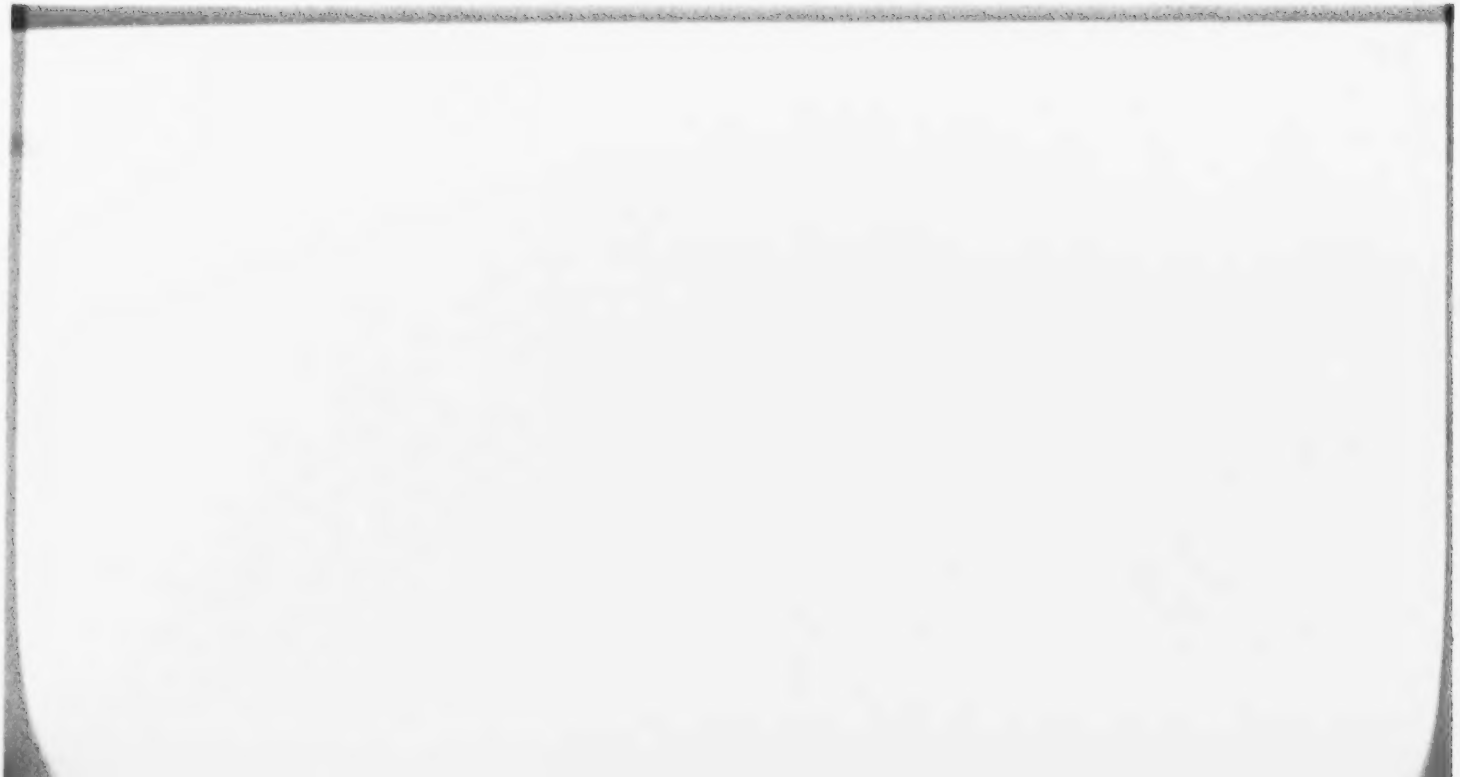
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IN THE

Supreme Court of the United States

October Term, 1972
No. 72-1561

PARADISE PALMS COMMUNITY ASSOCIATION,
Petitioner,

vs.

PARADISE HOMES, IRWIN MOLASKY and HARRY LAHR,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Nevada.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Opinions Below.

The opinion of the Nevada Supreme Court (App. B of Petition) is reported at 89 Nev. ...., 505 P.2d 596 (1973). The opinion in the prior action, *Paradise Palms Community Association v. Paradise Homes* (App. F of Petition) is reported at 86 Nev. 859, 477 P.2d 859 (1970).

Jurisdiction.

There is no certiorari jurisdiction. No federal question was raised by petitioner in the Nevada courts until it filed its Petition for Rehearing, which was too late to raise such a question. The claimed substantial federal question was not raised at any time. The Nevada Supreme Court decision is based on an adequate nonfederal ground.

Questions Presented.

1. Was a federal question raised at the appropriate stage of the Nevada proceedings?

2. Was the decision below based on an adequate nonfederal ground?

3. If questions 1 and 2 are answered in the affirmative, is there an important federal question presented?

Statement of the Case.

In the prior action respondent Paradise Homes (hereinafter "Paradise") on January 29, 1968, filed an action against petitioner to recover on a $23,000.00 promissory note. [R. 98.] Service was subsequently effected on Mr. Irwin Molasky. [Supp. R. 2.] A default judgment was entered on February 23, 1968. [R. 100.] On March 25, 1968, petitioner's property was sold at an execution sale. [R. 101-103.] Under Nevada law, such property was redeemable any time within 1 year after sale. (NRS 21.210.) Mr. Paul Sorenson, who admitted he "could possibly have been" aware of the execution sale before it occurred, communicated on April 4, 1969, with Paradise's attorney who agreed not to do anything with the property for three months. Sorenson then told him "I would take appropriate action when I deemed it appropriate to set aside any judgment they had secured." [Supp. R. 20-22.]

Almost 18 months later, petitioner filed a Motion to Set Aside Judgment. The motion was signed by Sorenson, an attorney, as "Member". The grounds of the motion were that Molasky was not an officer of petitioner, a fact Paradise was alleged to have known,

and alternately, if he was an officer, he had violated his duty as such. [R. 107-108.]

A hearing was held on November 3, 1969, at which Sorenson represented petitioner. He introduced evidence, both oral and documentary [R. 6-43], that showed, *inter alia,* that petitioner was a moribund organization and that only one person who had been a director still lived in the area. [R. 11-19.] The motion was denied on November 7, 1969. [R. 110.] On November 21, 1969, petitioner filed a Motion to Amend or Alter Judgment, again signed by Sorenson as "Member". [R. 113, 114.] After a hearing, that motion was denied on December 11, 1969. In its order denying the motion, the Court said the following:

> ". . . The Court does hereby make and adopt as its Finding of Fact and Conclusion of Law, with respect to the motion of the defendant to set aside judgment, the following:
>
> FINDING OF FACT:
>
> That at the time of service of process upon the defendant, IRWIN MOLASKY was the Secretary of the defendant.
>
> CONCLUSION OF LAW:
>
> Service of process upon the defendant was made as provided by law." [R. 115.]

Petitioner filed a Notice of Appeal from both orders of denial. (App. F of Petition.) After argument of that appeal, and on December 14, 1970, the Nevada Supreme Court affirmed the denials of both motions because the appeal from the denial of the motion to vacate was not timely filed. (App. F of Petition.)

The present action was commenced on March 4, 1971.[1] The complaint contains three causes of action. [R. 1-12.] The first cause seeks to have the judgment in the prior case declared void on the ground that Mr. Molasky was not an officer of petitioner at the time he was served. The second cause is predicated on the claim that Mr. Molasky was an officer of petitioner and by reason of his failure to take action after service of process, the sale was void and respondent Paradise Homes should be declared a trustee of the land sold on execution. The third cause seeks damages against respondent based on the facts alleged in the first two causes.

No federal ground for any of the relief sought is mentioned, directly or indirectly, in the complaint. No federal statute, constitutional provision, federal or state, was cited or alluded to, directly or indirectly. The words "fair trial", "due process of law" or "opportunity to be heard" which appear in petitioner's Petition for Rehearing (App. D of Petition) or words of similar import do not appear in the complaint.

Respondents' answer to the complaint affirmatively pled the defense of collateral estoppel. [R. 22, 23.] Summary judgment was granted with respect to the first cause of action. [R. 175.] Such judgment was affirmed on appeal. (App. B of Petition.)

---

[1]More than 3 months after commencement, respondent took the deposition of Paul Heit, who described himself as the "acting president" of petitioner. He testified that Sorenson was president of petitioner, but resigned "within the last few months." [Heit Depo. 6/14/71, p. 15.] He also testified that the only authority for the filing of the action came from Sorenson, whom he assumed was acting as legal counsel for the petitioner. [Heit Depo. 12/3/71, pp. 12-16.]

ARGUMENT.

I.

There Is No Certiorari Jurisdiction.

A. The Federal Grounds Now Urged Were Not Properly Raised as Required by Nevada Procedure.

Nevada does not permit a point not urged in the trial court, unless jurisdictional, to be considered on appeal. The most recent Nevada expression on the subject is *Britz v. Consolidated Casinos Corp.*, 87 Nev. 441, 447, 488 P.2d 911, 915 (1971):

> ". . . A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal [citing cases]."

See also, Cottonwood Cove Corp. v. Bates, 86 Nev. 751, 476 P.2d 171 (1970); *Clark County v. State,* 65 Nev. 490, 199 P.2d 137 (1948).

It is also firmly settled law in Nevada that the Nevada Supreme Court will not consider a point raised for the first time in a petition for rehearing.

> "It has been the universal practice to deny a petition for rehearing when based on a ground not urged upon the original hearing [citing cases]. *Howard's Estate,* 48 Nev. 106, 107, 232 P. 783 (1924).
>
> "It has long been a rule of this court that we shall not consider points raised for the first time in a petition for rehearing." *In re Petition of Lorring,* 75 Nev. 334, 335, 349 P.2d 156 (1959).

State procedure which forbids late raising of federal questions is a valid exercise of state power. *Williams v. Georgia,* 349 U.S. 375, 382-3 (1954); *Hulbert v.*

Chicago, 202 U.S. 275 (1906). Such procedure must be followed before this Court's jurisdiction can be invoked. *Ferguson v. Georgia,* 365 U.S. 570, 572 (1961); *In re Lamkin,* 355 U.S. 59 (1957).

Rule 23 1(f) of this Court's Revised Rules requires a detailed showing of the manner in which the federal questions have been raised, including "the stage in the proceedings in the court of first instance." Petitioner's purported compliance with such requirement is its statement that the federal question was raised "by opposing respondent's motion for summary judgment." (Petition at 6.) That opposition, which consists of a three-page "Memorandum in Opposition to Defendant's Motion for Summary Judgment" is part of the record. [R. 141-143.] Just as the complaint raises no federal question, that memorandum also raises none. It cites only two authorities, both Nevada, neither of which involves any federal question.

Even though the Nevada Supreme Court will not review a federal question not raised at the trial level, no claim is made by petitioner that the federal questions sought to be raised were raised in the Supreme Court before the rehearing petition. And even if the Nevada procedure was otherwise, appellate briefs are not part of the record and no claim of jurisdiction could be predicated on those briefs. *Lynch v. Nev. ex rel. Pierson,* 293 U.S. 52, 54 (1934).

No mention of any federal question appears in the opinion of the Nevada Supreme Court on the appeal (App. B of Petition) or the Order Denying Petition for Rehearing. (App. F of Petition.) It is assumed that the silence is due to the procedural deficiency. *Bailey v. Anderson,* 326 U.S. 203, 206, 207 (1945).

Point IV of the Petition raises the issue of whether due process permits an appearance by a member of an association to bind the association, and declares that the Nevada Supreme Court failed to address itself to this issue. (Petition at 11.) *This issue was never previously raised—not even in the Petition for Rehearing.* Thus, it is clear that no federal question has been appropriately raised in the proceedings below so as to give this Court certiorari jurisdiction.

B. The Nevada Supreme Court Decision Was Based on an Adequate Nonfederal Ground.

The opinion below held in favor of respondents on the ground of collateral estoppel. No federal ground was considered, because none was presented. Petitioner argues that collateral estoppel was an improper ground because petitioner was not properly served in the prior action. Petitioner does not claim that the issue of service was not litigated in the prior action, but instead relies upon the contention that the lower court in the prior action ruled that Sorenson had no standing to bring the motion to vacate and such ruling was approved by the Nevada Supreme Court. (Petition at 10.)

This is not true. While the trial judge in the first action, after finding valid service upon Mr. Molasky, did state "it does not appear that applicant has any standing to make such motion" (A. 110),[2] he did, when ruling on the subsequent motion, clarify the motion by making an appropriate finding of fact and conclusion of law, limited to the service issue. [R. 115.] It

[2]Contrary to petitioner's repeated claims, the court in the prior action had not "held" (Petition at 11) or "found" (Petition at 11, 12) that Sorenson lacked standing. It is only the above-quoted language that was used on one occasion.

is well settled law in Nevada, and elsewhere, that findings cannot be impugned by prior opinions and it is the former only which can be considered on appeal. *Haynes v. Buckley*, 165 Cal. App. 2d 96, 331 P.2d 693 (1958); *McCracken v. Teets*, 41 Cal. 2d 648, 262 P.2d 561 (1953); *Ratliff v. Sadler*, 53 Nev. 292, 299 P. 674 (1921).

The motion to vacate, as well as the notice of appeal, in the prior action were filed, not in the name of Sorenson, but in the name of petitioner. The Nevada Supreme Court, in both of its opinions, found that petitioner had filed the motion and appeal. (App. F of Petition, p. 36, App. B of Petition, p. 20). In the prior action, the Court declared that the trial court "found" Molasky was an officer of petitioner (App. F of Petition, p. 36) and in the opinion below, the Court said that "that issue of fact was adjudicated in the first case." (App. B of Petition, p. 20.)

Thus, we have the situation where the Nevada Supreme Court has consistently determined that the trial court in the prior action had denied the motion to vacate because service on Molasky was proper. In doing so, it was exercising its manifest right to decide the effect of proceedings held in one of its lower courts—to decide what construction to give to lower court pronouncements made during such proceedings, and assuming *arguendo*, inconsistencies in such lower court pronouncements, to resolve such inconsistencies. For this Court to hold that such determinations were constitutionally impermissible, because this Court construes their effect otherwise than the Nevada Supreme Court did, would suddenly elevate to federal constitutional proportions determinations with respect to matters of trial

court procedure—matters which truly involve state law and not federal questions.

The holding below that collateral estoppel precluded relitigation of petitioner's first cause of action, a holding on the only issue properly presented to the Nevada Supreme Court, was a determination made by it upon an adequate nonfederal ground.

II.

There Is No Important Federal Question Presented.

The Nevada Supreme Court did not hold that collateral estoppel was properly invoked because of a judicial determination in a prior proceeding in which petitioner was not served or in which it did not appear. As pointed out by petitioner, Nevada law clearly holds that a judgment is void if proper service of process is not made and such a judgment is subject to collateral attack. (Petition at 9, n.(2).) Rather, the Court held after a hearing at which petitioner participated and at which the trial court found that service had been validly made upon a person who was an officer of petitioner, that the issue of whether such person was an officer could not be relitigated.

Surely the question of the Nevada Supreme Court's construction of the trial court's actions, does not involve any federal question, let alone an important one.

Petitioner has attempted to posture a question of "national importance", namely "whether or not an appearance by a single member can bind an association." (Petition at 7, 8.)

This question was not raised at any stage of the Nevada proceedings and assuming *arguendo* that Nevada could not constitutionally hold that litigation of an

issue by a member of a moribund homeowners association, this question would be one applicable to petitioner only and not be one which presents a federal question of substance. *Cf., Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1954).

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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